GRENADA

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. GDAHCV2005/0409

BETWEEN:

LIBERTY CLUB

Claimant

AND

BEACON INSURANCE COMPANY

Defendant

Appearances:

Mr. Karl Hudson-Phillips, Q.C., and Ms. Jennifer Hudson-Phillips, instructed by Mr. Neil Noel for the Claimant
Mr. Leslie Haynes, Q.C., with Ms. Ria Marshall for the Defendant

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2012: April 25
2012: August 27

JUDGMENT

[1] ELLIS, J.: By Notice of Application filed on 4th November 2011, the Claimant sought leave to amend its Reply filed on 9th October 2006. The substance of the proposed amendment is to allow the Claimant to plead waiver in the following terms:

(a) That the Defendant by requesting the Claimant to provide a detailed claim and not a claim referred to in Condition 11 (b) (i) that is, one with particulars which are reasonably practicable, has waived strict compliance with the said condition.

(b) That further, the defendant by requesting the said detailed claim could only expect the Client to provide such detailed clam within a reasonable time and the time limit of the 30th November 2004 was not a reasonable time.

[2] The Application is trenchantly opposed by the Defendant.

[3] This application follows a protracted history in this action which is critical to the determination of the matters in issue. For that reason, a summary of the background is set out below:

BACKGROUND

1. By Claim Form and Statement of Claim filed on 16th September 2005, the Claimant sued the Defendant under a policy of insurance dated 17th September 2004 (the Policy) for loss, damage and consequential loss sustained to its property and business as a result of Hurricane Ivan. The suit was initiated on the basis that a claim was made in writing under the Policy and that the Defendant wrongfully failed to honour that claim.

2. In paragraph 8 of the original Statement of Claim the Claimant stated that particulars in respect of Plant, Machinery and Equipment (PME) and Furniture, Fixtures and Fittings (FFF) which are claimed on an indemnity basis, would be provided during discovery. Notwithstanding this, at paragraph 5 of the Statement of Claim, Liberty claimed a sum for PME and FFF. The overall value of the Claim amounted to in excess of $18,000,000.00.

3. The Defendant filed its Defence on 17th October 2005. In paragraphs 13-16 thereof, the Defendant pleaded that the Claimant's claim was time barred under Condition No. 11 of the Policy. In the premises, the Defendant claims that it is not liable to pay and the Claimant not entitled to recover the sums claimed under the Statement of Claim.

4. On 6th November 2005, the Claimant made a further amendment to its Statement of Claim (an earlier amendment in October 2005 amended the Defendant's name). Paragraph 8 of the Statement was amended to set out specific sums under each head of the Particulars of Loss. The overall claim was now expressed to be $16,000,000.00.

5. Having been granted an extension of time, Claimant filed its Reply on 9th October 2006 in which it joined issue with the Defendant on its Defence.

6. There have been numerous and protracted interlocutory applications filed in this action. The matter has also been case managed on several occasions commencing on 15th November 2005, with the last case management order made on 26th November 2007.

7. The matter was eventually set down for hearing on 18th November 2009. The trial was slated to last for a period of 5 days.

8. On the morning of the trial, the Claimant made an application for an order permitting it to amend its Reply. The application filed on 18th November 2009 was set out in the following terms:

> "The Claimant applies to the Court for an order that it be permitted to amend its reply in order to plead as follows:
>
> (a) That the Defendant by requesting the Claimant to provide a detailed claim and not a claim referred to in Condition 11 (b) (i) , that is , one with particulars which are reasonably practicable, has waived strict compliance with the said condition.
>
> (b) That further the Defendant by requesting the said detailed claim could only expect that Claimant to provide such a detailed claim within a reasonable time and the time limit of 30th November 2004 was not a reasonable time."

9. The evidence filed in support of the Application indicated that the Claimant only became aware of the need to amend its case at the time of preparing its pre-trial memorandum in June 2008, but that CPR 20.1 (3) prevented an amendment. The Claimant also stated that it did not become apparent until the preparation for the trial on 17th November 2009, that CPR 20.1 (3) may be unconstitutional in that it denies the Claimant a right to a fair hearing guaranteed under section 8 (8) of the Constitution.

10. By application filed on 25th November 2009 the Claimant also sought permission to amend its Statement of Claim however, that application is not directly relevant to the issues here.

11. These applications caused the trial to be aborted and the Attorney General was invited by the Court to make representations.

12. Both applications were heard on 8th March 2011. The application to amend the Reply was opposed by the Defendant on the basis of the clear wording of CPR Part 20.1 (3) which provided that the court may not give permission to a party to amend a statement of case after the first case management conference unless the party wishing to make the change can satisfy the court that the change is necessary due to

some change in the circumstances which became known after the case management conference.

13. At the hearing, the Claimant conceded that no change in circumstance had occurred and sought instead to challenge the constitutionality of CPR Part 20.1 (3). By judgment rendered in November 2011, the learned Price-Findlay J. dismissed the Claimant's application after finding that CPR Part 20.1 (3) did not offend section 8 (8) of the Constitution of Grenada.

14. The Claimant appealed this decision to the Court of Appeal. During the hearing of the appeal, the Claimant no longer sought to argue that CPR 20.1 (3) was unconstitutional as contravening section 8 (8) of the Grenada Constitution but rather argued that the amendment ought to be allowed so as to ensure compliance with the Claimant's constitutional right to a fair trial. The Claimant's attorney argued inter alia that to deny the Claimant the right to amend its reply in order to plead waiver solely on the basis of a technical pleading rule would be disproportionately prejudicial.

15. The Court of Appeal reviewed the relevant authorities on proportionality and examined the several factors which were relevant to this Application and dismissed the Claimant's appeal.

16. The Claimant then made an application to the Privy Council for special leave to appeal the Court of Appeal's decision. Leave was denied on the basis that the application did not raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee. [1]

17. Thereafter on 1st October 2011, the Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules 2011 came into force and *inter alia* repealed CPR 20.1 and substituted the following:

> "Changes to statement of case
>
> (1) A statement of case may be amended once, without the court's permission, at any time prior to the date fixed by the court for the first case management conference.
>
> (2) The court may give permission to amend a statement of case at a case management conference or at any time on an application to the court.

[1] A copy of the certificate dated 15th February 2012 evidencing the disposition of this appeal was presented to the Court during the hearing of this Application.

(3) A statement of case may not be amended without permission under this Rule if the change is one to which any of the following applies –

(a) Rule 19.4 (special provisions about adding or substituting parties after the end of a relevant limitation period);or

(b) Rule 20.2 (changes to statement of case after the end of relevant period).

(4) An amended statement of case must include a certificate of truth under Rule 3.12.

(5) The Chief Justice may, by practice direction, set out those factors to which the court must have regard when considering an application under this Rule."

18. On 7th September 2011, Honourable Chief Justice issued a Practice Direction Changes to Statements of Case - 5 of 2011 which sets out the factors to be taken into account when the court is considering an application under Part 20. Paragraph 5.11 of this Practice Direction provides that it came into effect on 1st October 2011 and extends its applicability to all claims whenever issued.

[4] This led to the instant Application. The grounds of this second application for leave to amend its Reply are as follows[2]:

i. The Claimant raised these issues in its pre-trial memorandum filed in June 30th 2008;

ii. The Claimant raised these issues in Article 10 of the witness statement of Mr Leon Taylor filed on 30th June 2008;

iii. Although the need to specifically plead these matters became apparent when the Claimant was preparing its pre-trial memorandum, CPR Part 20. 1 (3) prevented the amendment;

iv. It was not apparent until the preparation for trial on 17th November 2009, that CPR Part 20.1 (3) may be unconstitutional.

v. The Claimant made a similar application on 18th November 2009 and was refused by the High Court and unsuccessfully appealed to the Court of Appeal. An appeal is pending before Her Majesty in Council.

[2] Save for Grounds (v) and (vi)and (ix), the Grounds set out here repeat almost verbatim the grounds of the original application for leave to amend filed on 18th November 2009.

vi. In the meantime CPR 20.1 (3) was repealed by the Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules SRO 26 of 2011 which came into effect on 1st October 2011.

vii. It will not be necessary for any parties to adduce any new facts to meet these new averments.

viii. The issue of compliance with Condition 11 is central to the success of the Claim and to deny the Claimant the right to rely on these grounds on mere pleading point will be potentially fatal to its claim disproportionately prejudicial to it.

ix. There will be no resultant delay in the trial as no trial date has been fixed and in any event there is no need to adduce new evidence so that only a wording amendment is necessary.

[5] The Defendant asks that the Claimant's Application be dismissed with costs on the following grounds:

i. That the issue whether the Claimant should be granted leave to amend its reply has been fully litigated at first instance and on appeal. Both the High Court and the Court of Appeal have ruled on the substantive issue.

ii. That this application amounts to an abuse of process, the subject matter of this application being res judicata. The Defendant contends that the Claimant cannot expect to have a "replay" of the first application on the basis that the CPR has been amended.

iii. That the judgement of the Court of Appeal is a subsisting and final order which is binding on the parties to the proceedings in which it was made. Accordingly the Claimant is estopped from proceeding with this instant application.

iv. In any event, the Defendant submits that leave should not be given to amend its reply on the following bases:

a) That the defence raises nothing which would justify the Claimant in advancing a plea of waiver and seeking an amendment to its Reply on that basis.

b) There has been inordinate delay is seeking this amendment.

c) The hearing of this trial is bound to be further delayed since the Court must now deliberate on this second application.

d) That the amendment sought is not a "wording amendment" but rather a significant one that attempts to excuse the Claimant's delay in complying with the insurance policy.

e) There are no special circumstances upon which the Claimant can rely to prevent the Claimant from being faced with estoppel.

f) That there is nothing on the face of the Eastern Caribbean Supreme Court Civil Procedure (Amendment) Rules 26 of 2011 which gives it retroactive effect. The amendment cannot have retroactive effect to reverse or disturb the final order of the Court of Appeal.

ISSUES

[6] During the hearing of the Application, the Parties agreed that the relevant issues to be determined are as follows:

i. Is the Claimant's application to amend its Reply proscribed by the legal principle of "*estoppel per rem judicatam"?*

ii. If the application is not so proscribed, whether the court should exercise its discretion to grant the application on the merits.

CLAIMANT'S SUBMISSIONS

[7] The Claimant in its written submissions contends that it is able to make this second application in the wake of the dismissal of its previous application because the issue which is now before the Court is not the same as maintained in the previous application. It states that the first application was circumscribed by a procedural rule which only permitted amendments after a change in circumstances, whereas the present rule imposes no such precondition. It contends further that the first application was a constitutional challenge whereas the present application is an amendment based on newly prescribed circumstances. There having been no ruling or judgement in regards to this latter issue, the Claimant submits that there can be no estoppel.

[8] In oral arguments, the Claimant's attorney stated that the Claimant has always conceded that the Court had no discretion under the former Part 20 (1) (3) to allow the amendment where there had been no change in circumstances. That matter was never in issue. What was in issue was the constitutionality of that Rule.

[9] As CPR Part 20 (1) was amended in 2011 following the Court of Appeal Judgement, it follows that the Court could not have exercised its discretion under the amended Part 20 (1). Counsel for the Claimant contended that where an issue has not been decided there can be no issue estoppel. In support of this contention he cited the case of Matadeen v Caribbean Insurance Co. Ltd. Privy Council Appeal No. 46 of 1999.

[10] The Claimant's counsel also cited the case of Hines v Birkbeck College and Anor No. 2 [1991] 4 All E.R 450 in which the English Court of Appeal concluded that:

> "When an action is dismissed on the sole ground that the particular court had no jurisdiction there was no decision on the matter in controversy estopping the Plaintiff from suing again in a court which did have jurisdiction."

[11] Counsel submitted that the amendment to CPR Part 20.1 enables the Court to now entertain and grant the Claimant's application to amend.

DEFENDANT'S RESPONSE

[12] In response, Counsel for the Defendant stated that contrary to what was indicated by Counsel for the Claimant, the arguments before the High Court were not confined to the *vires* or constitutionality of Part 20 (1) (3) at all. He submitted that the judgement broadly discussed all of the issues which could attend the amendment if indeed the application had to be decided on the basis that the Rule did not restrict the Claimant's ability to amend.

[13] He noted in particular, paragraphs 3, 9 and 11- 14 of the Court of Appeal Judgement in which he states that the Court considered the factors of delay, prejudice to the Claimant and the Defendant and the administration of justice. He submitted that it would be incorrect to state that the only issue before the High Court and the Court of Appeal was the question of the constitutionality of Part 20.1 (3) as the judgment clearly reveals that the factors now prescribed in paragraph 4 of Practice Direction 5 of 2011 were at the forefront of the reasoning of the Court of Appeal. The Court's approach was that even if

the Claimant was right on the constitutional argument, it still had to contend with the hurdles of delay, prejudice and the administration of justice.

[14] Counsel for the Defendant stated that notwithstanding the legislative changes, the prior decision of the Court of Appeal is conclusive. Issue estoppel applies and the Claimant is estopped from making the present application.

CLAIMANT'S REPLY

[15] In his Reply, Counsel for the Claimant stated that the *ratio decidendi* of the High Court judgement is found at paragraph 48 – 51 and that of the Court of Appeal judgement is set out at paragraph 9. This *ratio* clearly set out that the relevant issue for both Courts was the constitutionality of the Rule. He described any observations which may have been made outside of the *ratio decidendi* as *obiter dicta* which would not operate to bind this Court.

ISSUE ESTOPPEL

[16] It is now settled law that when an issue has been previously litigated and determined by the Court, the parties to the proceedings are not entitled to challenge or contradict the judgement of the court in subsequent legal proceedings. The judgement of the court therefore decides issues in dispute before it once and for all. These issues cannot be disputed by the same parties again before the same or another court.

[17] It is also settled law that issue estoppel applies to facts directly decided as well as those matters which form part of the decision which were necessary to making the finding of fact or law. Accordingly, matters forming the ground work of those points although not directly decided, may also be caught by issue estoppel provided that those points are necessary and fundamental to the judgment.

[18] It is clear however, that there are circumstances where issue estoppel will not apply. The Court must therefore consider the circumstances in this particular case.

ISSUE ESTOPPEL AND INTERLOCUTORY JUDGEMENTS

[19] While there are interlocutory decisions which determine an issue or question in the course of proceedings and which can be deemed to be final and conclusive for res judicata

purposes, in general interlocutory applications are not designed or intended to adjudicate finally on issues of fact or law raised by the pleadings in an action. They are generally intended to simply bring such issues to trial.

[20] The court is of the opinion that the principle of issue estoppel does not apply to an interlocutory application in the nature of the instant application.

[21] There is general support for this view in Phipson on Evidence[3] which provides as follows:

> "The Rule that a judgement is open to challenge unless final is of importance principally in other proceedings on different substantive questions between the same parties. It also has the important practical effect that the failure of an interlocutory application is no bar to its renewal."

[22] The writers in Phipson found support for this view in the case of Buttes Gas &Oil v Hammer [1982] AC 888 where the House of Lords in 1975 refused leave to appeal against a decision of the Court of Appeal but in 1980 granted leave to appeal, out of time from the same decision.

[23] The case of Stephenson v Garnett [1898] 1 QB 677 is also instructive. In this case, the defendant asserted as a defence that the matter in issue by the plaintiff had been decided on an interlocutory application to tax costs in earlier proceedings between the parties. Although the Court of Appeal held that the issue of fact and its consequences put forward in the plaintiff's claim had in the circumstances been effectively determined between the parties in earlier interlocutory proceedings, it declined to apply res judicata to an interlocutory application. The Justices of Appeal were unanimous in their conclusions which were best summarised by Collins L.J at page 682:

> "…I agree that there is difficulty in bringing this case within the doctrine of res judicata. It is very difficult to say that an interlocutory proceeding, whereby leave to proceed with taxation of costs under a judgment was obtained could be made the foundation of a plea of res judicata in an action to enforce the covenants in the deed."

[24] It follows therefore that the rejection of an interlocutory application is not generally a bar to its renewal if the rejection was *"not a determination of issues, but merely an exercise of*

[3] 15th Edition, Sweet and Maxwell 2000 at paragraph 38-05 at page 990-991

discretion and the decision whether or not to grant a discretionary procedural remedy". Mullen v. Conoco Ltd [1998] QB 382 (CA) at 396 per Hobhouse LJ;

[25] In the case of Pockington Foods Inc. Alberta (Provincial Treasurer) [1995] 123 DLR (4th) 141 the Alberta Court of Appeal determined that res judicata and issue estoppel did not apply to procedural interlocutory motions. In that case the plaintiff unsuccessfully applied for disclosure of documents in the defendant's possession over which the defendant claimed public interest immunity. That decision was upheld on appeal. Later the plaintiff re applied for disclosure. On the second application, the trial judge determined that the principles of res judicata and issue estoppel did not generally apply to interlocutory procedural applications and concluded that there had been intervening factors since the original motion. On an appeal to the Alberta Court of Appeal the Court referenced and approved the reasoning in Talbot v Pan Ocean Oil Corp [1977] 4 CPC 107 and held that:

> "While res judicata and issue estoppel do not apply to procedural motions, the court is not powerless to deal with attempts to re litigate issues already decided by it. The Court is entitled to exercise its judicial discretion to determine if under the circumstances a second application is frivolous, vexatious, the object of the court being to avoid re argument and re litigation of issues already dealt with by the court and in respect of which an order has been taken out."

[26] The Court agrees with this approach. Although the Court recognises that this case has no binding authority, it considers that it should be guided by the persuasive authority of that decision. In arriving at its decision the Alberta Court of Appeal clearly considered and applied the applicable English precedents.

[27] It is clear that the application before the Court is the second such application made by the Claimant. Notwithstanding the novel grounds upon which the previous application proceeded, the aim of the Claimant was ultimately to secure an interlocutory procedural remedy.

[28] The issues raised during this Chamber hearing concern the effect of judgments rendered in regards to the previous interlocutory application made by the Claimant in which it sought leave to amend its Reply. For the reasons indicated, the Court does not accept the Defendant's contention that the principle of issue estoppel applies to this second application.

[29] However the fact that res judicata does not apply to such applications does not imply that a party can endlessly apply for the same reliefs from the court. The court's power to restrain abuse of process can clearly be used to halt unmeritorious and repetitive interlocutory applications.This was confirmed by Smith L.J. in Stephenson v Garnett [1898] 1 QB 677 at page 680, where prescribed the appropriate course which should have been adopted by the judge in the following way:

> "In my opinion the learned judge at chambers ought to have exercised the inherent jurisdiction which he undoubtedly possesses of staying the action on the ground that is frivolous and vexatious and an abuse of the process of the court. I do not rest my decision upon the ground that the matter is res judicata, for I do not think that it can be said that it is."

[30] This statement of the principle is accepted as the appropriate approach which should to be adopted by the Court when exercising its discretion to entertain a second procedural interlocutory application.

[31] The Court must therefore consider whether the Claimant's second application will lead to the re litigation or re argument of issues already raised and dealt with in the previous judgments and must exercise its discretion to determine if this second application amounts to an abuse of its process.

ABUSE OF PROCESS

[32] At the time of the first application and under the original CPR Part 20.1 (3), the Court was only able to amend statements of case following case management, where a change in circumstances could be made out. The Claimant was clearly circumscribed by the rule and expressly conceded the same. Instead the Claimant's attorney argued that to deny the Claimant the right to amend its Reply solely on the basis of a technical rule would be disproportionately prejudicial and would deprive it of its constitutional right to a fair trial.

[33] There can be no doubt that the legislative amendment relaxes the former inflexible regime which governed amendments to statements of case.[4]

[34] The Claimant argues that its present application is not seeking to re litigate the constitutionality of the Rule but rather, seeks to have the court exercise its discretion

[4] Charmaine Bernard v Ramesh Seebalack 2010 UKPC 15 at paragraph 33

under the amended Rule and to apply the factors prescribed in Practice Direction 5 of 2011.

[35] However, it is apparent, that both Price –Findlay J. and the Court of Appeal directed their attention to the factors which now fall to be considered by the Court in applying CPR Part 20.1 as amended. Counsel for the Defendant referred the Court to several paragraphs in the Court of Appeal judgment which demonstrated that the Court considered;

1. That there was inordinate delay which was not justifiably explained by the Claimant: Held: paragraph 3 and paragraph 13 of the Judgment.
2. The prejudice to the Claimant: paragraphs 9 and 13 of the Judgment.
3. The prejudice to the Defendant and the overriding objective: paragraph 14 of the Judgment.
4. Administration of justice: paragraph of 13 and 14 of the Judgment.

[36] After considering the issue of proportionality, the appellate Court examined and made definitive pronouncements on the very factors which the Claimant now seeks to re-open and re argue in this second application. It is clear that the issues of delay, prejudice and the administration of justice were distinctly raised and debated in the previous application. The Court is of the view that to bring the application in such circumstances would result in a re litigation of identical issues and would amount to an abuse of its process.

[37] The Court is also mindful that grounds (i), (ii), (iii), (iv), (vii) and (ix) of the Claimant's Application filed on the 4th November 2011 were squarely before the Court in the previous application to amend and would have been carefully considered.

[38] It would in the Court's view, be unreasonable, unjust and waste of valuable resources to permit these same grounds and issues to be argued.

[39] However, in the event that the Court has reached an incorrect conclusion, I have considered the application on its merits and in light of Practice Direction 5 of 2011.

Amendments to Statements of Case – CPR Part 20 (1)

[40] Paragraph 4 of Practice Direction 5 of 2011, sets out the factors which a Court must take into account when considering an application under CPR Part 20.1. They include:

i. How promptly the applicant applied to the court after becoming aware that the change was one that he wished to make.
ii. The prejudice to the applicant if the application is refused.
iii. The prejudice to the other parties if the change is permitted.
iv. Whether any prejudice to any party can be compensated by the payment of costs or interest.
v. Whether the trial date or any likely trial date can still be met if the application is granted.
vi. The administration of justice.

[41] The Claimant in applying Part 20.1 (as amended) submits that leave should be given to amend its reply. In written submissions it contends that:

i. The Claimant only became aware of the necessity to plead waiver in June 2008 when preparing its pre-trial memorandum. It did not seek to amend its pleading at the time because at the time Part 20.1 (3) limited the ability to amend its statement of case.
ii. That to deny the amendment will be potentially fatal to its claim and disproportionately prejudicial to it as its claim may well be defeated by the inability to raise waiver.
iii. The Defendant will not be prejudiced by the application in that the facts giving rise to the waiver are not in dispute and are already set out in several witness statements and documents filed by both parties. There will be no need for new evidence.
iv. The Defendant will not be prejudiced by the amendment to any extent that cannot be compensated in costs to account for the resultant delay. Further that the Defendant has not alleged any prejudice. That there is no need to delay the trial as this is a paper amendment as the facts are not in issue and before the court.
v. The trial date is already vacated and amendment to the reply will not affect any trial date.
vi. The interest of the administration of justice requires that the Claimant be given an opportunity to amend its reply in the matter herein.

[42] It is not disputed that the Defendant's defence filed on 17th October 2005 sufficiently deployed the factual and legal basis upon which the Defendant intended to rely at trial.

Counsel for the Claimant ought to have been well aware of the case to be met given the subject matter of this action. There is no plausible reason proffered as to why Counsel only recognised the need to amend the Claimant's Reply in 2008. Further, having reached that conclusion in June 2008, no satisfactory or proper reason is proffered to explain a further delay of some 17 months before making its application on the morning of the trial. In that regard, the Court agrees with the observations of both Price-Findlay J and the Court of Appeal.

[43] The amendment to CPR Part 20.1 notwithstanding, the Claimant still has not tendered any plausible reason to explain or justify its lack of promptitude.

[44] In the overall context of this case, it is clear that this application comes very late in the day. Counsel for the Claimant does not deny this; rather, he referred the Court to the case of Nottinghamshire and City of Nottingham Fire Authority v Gladman Commercial Properties and Anor 2011 EWHC 1918. In that case the High Court considered an application to rely on the evidence of two new witnesses made during the course of the trial. In his reasoning Peter Smith J, noted that there were conflicting Court of Appeal authorities on the relevant criteria to be applied. He referred to the cases of Cobbold v Greenwich LBC [1999] EWCA Civ. 2074 and Swain-Mason & Ors v Mills & Reeve (A Firm) [2011] EWCA Civ. 14 and concluded that he should follow the *Cobbold* decision. Accordingly, he held that a judge must weigh all of the relevant factors in the case and come to the appropriate conclusion in accordance with his duties as enshrined in the CPR. Lateness could only be one factor, and it should not be given an elevated status above any other factor.

[45] Counsel for Gladman relied on the case of Swain-Mason & Ors v Mills & Reeve (A Firm) which concerned a late amendment to a statement of case. However the Court considered that different criteria applied to late witness evidence which was less likely than an amendment to add something entirely new. In the Court's view, the distinction drawn by the Judge in Nottinghamshire makes the case of Swain-Mason & Ors. v Mills & Reeve (A Firm) the more relevant authority.

[46] In *Mills & Reeve,* the Defendants applied to amend their defence at the start of a trial. This was granted by the judge but reversed by the Court of Appeal which held that where a very late application to amend is made by a party to raise a new and significantly different case and it is made not on the basis of some recent disclosure of new evidence,

but in circumstances where the party has had many months in which to consider how he wants to put his case and opportunities to amend it, a heavy onus lies on him to justify it. The Court must therefore consider whether the Claimant as discharged this onus.

[47] Counsel for the Claimant argues that without the amendment a serious injustice may be done. He contends that to deny the amendment will be potentially fatal to its claim and disproportionately prejudicial to it as its claim may well be defeated by the inability to raise waiver.

[48] Based on the current state of the pleadings and the evidence filed by the witnesses, the Court does not accept this contention.

[49] At paragraph 15 of its Amended Defence, the Defendant concedes that it agreed to grant the Claimant an extension of time for the filing of its insurance claim up to 30th November 2004. The Defendant maintains that the Claimant did not meet this agreed deadline.

[50] It is the Claimant's case that the claim was in fact submitted by the 30th November 2004.[5] This contention is also pleaded at paragraph 2 of its Reply and is underpinned by the witness statement of Mulchan Caseram in which he certifies that he forwarded a summary of the claim for material damage (totalling EC$18,311,840.86) to the Defendant by the agreed deadline.

[51] The Amended Defence pleads that the Claimant failed to satisfy the Condition of the Policy and particularises this failure as follows:

(a) "The Claimant failed to take steps to mitigate its loss and damage.

(b) The Claimant failed to deliver in writing to the Defendant on or before the 30th November 2004, being the last extended deadline granted by the Defendant for submission of its claim, a claim for loss or damage

(c) The Claimant failed to deliver in writing to the Defendant on or before the deadline particulars of all other insurance."

[52] The Defendant now seeks an amendment to say that by requesting the Claimant to provide a detailed claim and not a claim referred to in Condition 11 (b) (i) that is; one with

[5] Paragraph 6 of the Statement of Claim

particulars which are reasonably practicable, the Defendant has waived strict compliance with the said condition.

[53] Nowhere in the Amended Statement of Claim or the Amended Defence is it pleaded that the Defendant requested the Claimant to provide such a claim.[6]

[54] The Claimant is not seeking a slight or trivial amendment. The proposed amendment (which seeks to put forward an un-particularised plea of waiver) will for the first time raise an entirely new legal issue which the Defendant contends is not contextualised in the pleadings before the Court. The Court accepts this contention.

[55] It is in that context that the Court must consider the potential for prejudice to the Claimant. Counsel for the Claimant argues that this issue of compliance with this Condition is central to the success of the Claim. One wonders then how such a critical issue could have so long been ignored in the Claimant's pleadings.

[56] Ultimately, whether the insurance claim which is alleged to have been submitted, will prove a sufficient answer to the Defendant's case will be a matter for argument at the trial. No doubt the Court will also be required to analyse the correspondence between the parties and construe the legal effect of the Condition 11. The Court therefore does not agree that a refusal of this application will have the nuclear effect suggested by the Claimant.

[57] Counsel for the Claimant also submitted that leave to amend should generally be granted where any prejudice to the other party could be compensated for in costs and there was no significant harm to the administration of justice.

[58] Having regard to all the circumstances of this case, the Court is satisfied that granting this application will result in significant unfairness to Defendant. Contrary to what Counsel for the Claimant has indicated this is not a simple "paper amendment" but rather, a fundamental change of course by the Claimant. The thrust of the amendment alleges that the Defendant expressly or by conduct waived its legal rights under the Policy. The Claimant will no doubt seek to argue that the Defendant is estopped from insisting on those legal rights. There can be no doubt that this would impose a disadvantage on the

[6] Civil Appeal- HCVAP 2010/029 Beacon Insurance Ltd. v Liberty Club Ltd

Defendant which will have to revisit its case some 7 years into the litigation and after the matter has already been previously set down for trial. It is difficult to see how costs or interest could adequately compensate the Defendant in this case.

[59] The Defendant has had this matter "hanging over its head" since 2005 and has had to patiently await its day in court. The Court accepts that the proposed amendment is a significant one which has the capacity to change the complexion of the Defendant's case. The Court has no doubt that it will necessitate the filing of further pleadings (or at the very least consequential amendments) by the Defendant disputing an election to waive its legal rights under the Policy. Counsel for the Defendant has indicated that it may necessitate the filing of further applications, further or additional witness statements and the Court cannot discount this. Inevitably it will also necessitate further case management and review by the Court.

[60] It is certain that any order granting leave to amend the Claimant's Reply will result in yet further delays. Given these factors and given the current court schedule, it is unlikely that this matter could be set down for trial in the foreseeable future. This does not augur well for the overriding objective or the administration of justice.

[61] To say that this has been a protracted lawsuit would be an understatement. Some 7 years have now passed since Defence was filed; 4 years have passed since June 2008, and it has been almost 3 years since the trial was aborted. This is a substantial claim and the court office wisely reserved 5 calendar days for its trial. There have been copious applications and multiple case management conferences. There are numerous witnesses who have to be assembled from all over the world and who have stood in readiness to have this matter tried. In such circumstances the overriding objective demands that the parties efficiently dispose of their litigation.

[62] At the end of the day, an application for an amendment of a party's claim is dependent upon the exercise of a court's discretionary power. In exercising that power, a court must have regard to the stated objectives of the Civil Procedure Rules which make it plain that they are to be applied having regard to the timely disposal of the proceedings at an affordable cost. The Court has considered all of the relevant factors prescribed in the Practice Direction and has weighed the competing interests of not only the individual litigants but also the interests of litigants as a whole, who depend on a speedy and efficient judicial system.

[63] Having regard to all the circumstances, including the proposed amendment, striking the balance in this case means that the Claimant's application must be refused.

[64] It is therefore ordered as follows:

1. The Claimant's application for leave to amend its Reply is dismissed.
2. The Claimant will pay the Defendant's costs of the application to be assessed if not agreed.

Vicki Ann Ellis
High Court Judge